IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MASCHARKA,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
LEOLA FAMILY RESTAURANT, INC.,	:	
D/B/A LEOLA FAMILY RESTAURANT,	:	
SMUCKER MANAGEMENT CORP.,	:	
BIRD-IN-HAND CORP.,	:	
GEORGE DESMOND AND	:	
PATRICIA DESMOND, H.W,	:	
	:	
Defendants	:	NO. 03-4051

Gene E.K. Pratter, J. Memorandum 23 December 2004

Defendants Leola Family Restaurant, Smucker Management Corporation, Bird-in-Hand Corp. and George and Patricia Desmond move for summary judgment in their favor in this personal injury and premises liability diversity action. For the reasons that follow, the motion is denied.

FACTUAL BACKGROUND

William Mascharka, the 62 year old plaintiff in this case, alleges that the defendants Leola Family Restaurant, Inc., Smucker Management Corporation, Bird-in-Hand Corporation, and George and Patricia Desmond (collectively, the "Defendants") are responsible for injuries he suffered as a result of falling on a set of exterior steps at the Leola Family Restaurant in Lancaster, Pennsylvania.

Mr. Mascharka asserts that on July 11, 2001, as he was descending a set of exterior cement steps outside of the restaurant, he fell and sustained serious and permanent personal injuries,

including a rupture to his right quadriceps tendon. Mr. Mascharka alleges that his fall was caused by variations in the riser height and tread depth of the steps, and that these variations violated applicable building standards. Mr. Mascharka additionally claims that his fall was exacerbated because he was unable to reach the handrail provided for the stairway, which was positioned at the center of the expanse of the steps and out of his reach, and that as a business invitee of the restaurant, the Defendants breached their duty to maintain the premises of the restaurant in a safe condition. Thus, Mr. Mascharka asserts that the Defendants' negligence caused his injuries.[1]

During the course of discovery, Mr. Mascharka retained Apex Engineering Company to evaluate the step area and prepare a report (the "Apex Report"). The findings in the Apex Report state that Mr. Mascharka's fall was "caused by one or a combination of" either excessive variation in riser heights or inadequate handrails. The Apex Report also discusses the repercussions of excessive variation in riser heights and poor stairway geometry. After stating that the construction of the stairway violated both the "generally accepted standards of care" for such exterior stairways and the Pennsylvania Building Code, the Apex Report concludes that "the incident stairway was hazardous at time of incident because of inadequate handrails and excessive variation in riser heights." The Defendants do not have their own expert witness and have not refuted the Apex Report, but rather argue for summary judgment on the grounds that (1) they did not breach any duty owed to Mr. Mascharka because the defect of the stairway was "open and obvious"; (2) there was a safe path which Mr. Mascharka voluntarily and knowingly avoided and that he therefore assumed

[1] Although the original complaint alleged that the Defendants were liable for negligent and reckless behavior, on August 25, 2003, the parties stipulated to strike the allegation of recklessness from the complaint.

risk in descending the center of the stairway, rather than using the handrail provided along the side of it; and (3) under Pennsylvania law, the "defects" complained of are considered trivial and are, therefore, not actionable.

DISCUSSION

Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" if its resolution one way or the other might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met this initial burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Summary judgment is appropriate if the non-moving

party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented in the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

Obviousness of Stairway Defect

The Defendants argue that because the defect was, or should have been, obvious to Mr. Mascharka, no liability should lie under Pennsylvania law. Citing several cases in which Pennsylvania courts have found no duty to protect business invitees from obvious defects, see, e.g., Palenscar v. Michael J. Bobb, Inc., 266 A.2d 478 (Pa. 1970) (risk of electrical shock obvious to worker called to perform electrical repairs); Repynek v. Tarantino, 202 A.2d 105, 107 (Pa. 1964) (risk confronted by worker hired to move cemetery monument); Kubacki v. Citizens Water Co. of Washington, Pa., 170 A.2d 349, 351 (Pa. 1961) (finding that condition of lake bed would have been apparent or easily discovered by fisherman using property), the Defendants point out that in his deposition, Mr. Mascharka admitted that there was nothing obstructing his view of the stairway and that there was nothing to prevent him from seeing the last step upon which he tripped and fell. The Defendants thus argue that because the defect in the stairway was obvious, they did not breach any duty.

Mr. Mascharka responds to this argument by noting that while the defect in riser height should have been apparent to the Defendants, it was not readily apparent to the Defendants' patrons. Mr. Mascharka points out that the standards for the construction of stairways clearly demonstrate that variations in height and depth of stair treads are dangerous because such variations are not

readily apparent to persons ascending or descending stairs. Mr. Mascharka further argues that the cases cited by the Defendants are inapposite because Mr. Mascharka was not in a position to recognize the danger poorly construct steps could present.

In defining the common law duties a business owner owes to a business invitee, the Supreme Court of Pennsylvania has adopted Section 343 of the Restatement (Second) of Torts ("Section 343"). Carrender v. Fitterer, 469 A.2d 120 (Pa. 1983); see also Kirschbaum v. WRGSB Assocs., et al., No. 97-5532, 1999 WL 1243846 (E.D. Pa. Dec. 14, 1999) (interpreting Pennsylvania law). Pursuant to Section 343, a "possessor of land" owes a "duty to protect invitees from foreseeable harm which are known to or are discoverable by the possessor if he: (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee; (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it; and (3) fails to exercise reasonable care to protect them from danger." Carrender, 469 A.2d at 123. Thus, a plaintiff must show that a defendant land owner had notice of a defective condition and was aware that the condition posed an unreasonable risk of harm. See Kirschbaum, 1999 WL 1243846, at * 10.

No liability for physical harm will lie if a condition is known or is obvious to the invitee. Carrender, 469 A.2d at 123; see also Bream v. Berger, 130 A.2d 708, 709 (Pa. 1957). A danger is considered obvious when "both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising normal perception, intelligence and judgment." Carrender, 469 A.2d at 123. Examples of conditions that have been found to be obvious and therefore precipitate no duty have included risks of danger confronted by workers or

repair persons who are hired to conduct repairs or maintenance, see Palenscar v. Michael J. Bobb, Inc., 266 A.2d 105 (Pa. 1970) (identified supra); Bream v. Berger, 130 A.2d 708, 709 (Pa. 1957) (finding it obvious that individual would need to step clear of outward opening door). Unless reasonable minds could not differ as to whether a condition or defect was obvious, the question is one for a jury or factfinder to decide. Carrender, 469 A.2d at 124.

In the instant case, the Court finds that the question as to whether the defect in the stairs was obvious is a question best left for a jury to decide. The record presented does not convince the Court that the stairway defect was so obvious that there was no duty to warn Mr. Mascharka to exercise care when descending the stairs, as there is evidence to suggest that the defect would not have necessarily been obvious to an unsuspecting patron. First of all, pursuant to the Apex Report, the difference between the riser height between the second and third step was one-eighth of an inch, and the difference between the riser height between the third and fourth step was seven-eighths of an inch. Secondly, Mr. Mascharka testified that he had been to the restaurant three to five times before his fall, and that he had not seen anyone having problems with the steps. Finally, when recalling the accident, Mr. Mascharka stated that he saw no defect on the step, but "just ran out of tread and lost my balance by pushing down thinking that there was tread there and there wasn't."

While the Court recognizes that the Apex Report prepared by Mr. Mascharka's expert indicates that the defects were "apparent and were (or should have been) so for a long period of time," it appears reasonable to read the Apex Report as suggesting that the unsafe condition should have been apparent to the property owner for the purpose of notice, rather than to a patron using the steps. Considering the relatively small variations in riser height, the defect may not have been so

obvious from the vantage point of a patron descending the steps that reasonable minds could not differ in concluding that a patron, such as Mr. Mascharka, should have been aware of it. Thus, summary judgment based on this argument is not appropriate.

Assumption of Risk by Mr. Mascharka

The Defendants next argue that they should not be held liable for Mr. Mascharka's alleged injuries because Mr. Mascharka chose not to use the available railing while descending the steps and thereby assumed the risk that he might fall.[2] In response, Mr. Mascharka argues that because there is no evidence that he either knew or appreciated the specific danger of falling on defective steps, assumption of the risk is not a viable reason to grant summary judgment.

The Pennsylvania Supreme Court has expressed some concern regarding the application of the doctrine of assumption of risk because it has been perceived to conflict with the Commonwealth's comparative negligence statute. See Howell v. Clyde, 620 A.2d 1107, 1112-13 (Pa. 1993); Carrender v. Fitterer, 469 A.2d 120, 122 (Pa. 1983). The Court of Appeals for the Third Circuit has concluded that under Pennsylvania law, the assumption of risk analysis is incorporated into the analysis of whether a property owner owes a duty to the injured party. Kaplan v. Exxon

[2] At oral argument, the Defendants provided further support of this argument by presenting the Court with Van Hauter v. Olympic Gardens, No. 132 EDA 2004 (Pa. Super. Ct. 2003), a non-precedential unpublished opinion in which the court found that a defendant property owner had no duty with respect to injuries incurred by a plaintiff who, at midnight, chose to traverse a grassy unlit area rather than the sidewalk that was provided. In so concluding, the court noted that the danger of traversing an unlit grassy area late at night presented dangers that were both known and obvious to the plaintiff, and the danger could have been avoided by using the sidewalk. Setting aside that Van Hauter is not precedential, the Court is not persuaded by the case because it is inapposite to the present circumstances. There is a significant difference between choosing to travel on an unlit, grassy path in the dark when a sidewalk was available and a midday choice to descend a short flight of wide stairs out of the reach of the centrally located handrail.

Corp., 126F.3d 221, 225 (3d Cir. 1997). Thus, once a plaintiff establishes that a duty was owed, a jury must decide whether, under the comparative negligence statute, 42 Pa C.S.A. § 7102(a), a plaintiff exposed himself to risk such that a defendant would be relieved of any duty to the plaintiff. Kaplan, 126 F.3d at 225.

In the context of a summary judgment motion, unless "reasonable minds could not disagree that the plaintiff deliberately and with the awareness of specific risks inherent in the activity nonetheless engaged in the activity that produced his injury," the decision as to whether a defendant bore a duty to a plaintiff and whether a plaintiff exposed himself to risk such that a defendant would be relieved of any such duty is a matter for the jury to decide. Howell v. Clyde, 620 A.2d 1107, 1112-13 (Pa. 1993); see also Kaplan v. Exxon Corp., 126 F.3d 221, 225 (3d Cir. 1997).

In this case, reasonable minds could disagree as to whether the Defendants owed a duty to Mr. Mascharka and, in turn, whether Mr. Mascharka excused such duty by assuming the risk of descending the stairway without holding onto the handrail. As was discussed supra, there is a factual dispute as to whether the defect in the stairway was readily apparent and obvious to Mr. Mascharka or someone in his shoes. Whether Mr. Mascharka assumed the risk of descending a defective stairway logically extends from the question as to whether he knew that the stairway was defective. As a result, granting summary judgment in favor of the Defendants based on the argument that Mr. Mascharka assumed the risk is not appropriate here.

Triviality of Defects

The Defendants finally argue that they cannot be held liable for Mr. Mascharka's injuries because Pennsylvania law does not permit recovery for injuries allegedly caused by a mere, or

trivial, defect in their property. In support of this argument, the Defendants cite to three Pennsylvania cases which they assert provide "[e]xamples of elevations, depressions and irregularities upon which the Pennsylvania Supreme Court has held, as a matter of law, no liability could be predicated." See, e.g., Harrison v. City of Pittsburgh, 44 A.2d 273 (Pa. 1945) (finding two inch elevation of manhole cover was "slight and of a trivial nature"); Magennis v. City of Pittsburgh, 42 A.2d 449 (Pa. 1945) (noting that municipality "is under no duty to maintain the surface of a sidewalk free from 'slight irregularities'"); Foster v. Borough of West View, 195 A.82 (Pa. 1937) (finding that city had duty to maintain streets in "reasonably safe condition for travel").

In turn, Mr. Mascharka argues that the defects in this case do not compare to variations in sidewalk or street grades. Rather, Mr. Mascharka asserts that there is sufficient evidence that the variations in tread depth and riser height caused his fall, and that the defect in the stairs would not be considered trivial under the law.

The Court agrees with the defense proposition that a municipality or business owner does not bear a duty to maintain the land free from "slight irregularities," see Magennis v. City of Pittsburgh, 42 A.2d 449, 450 (Pa. 1945). However, unless a defect is obviously trivial, its gravity should be a fact determined in light of the circumstances of the particular case. See Massman v. City of Philadelphia, 241 A.2d 921, 923 (Pa. 1968) (finding that circumstances required question of triviality of defect to be decided by jury); Breskin v. 535 Fifth Avenue, 113 A.2d 316, 317 (Pa. 1955) (noting that "except where the defect is obviously trivial" question as to whether defect was sufficient to render liability should be decided by jury).

In the context of stairway defects, commentators have observed that a slight difference in the

height of stair risers may not be a basis for liability if there is no evidence that the slightly higher step caused the fall. Louis Lehr, 3 PREMISES LIABILITY § 50:1 (3d ed.West 2004). Courts within Pennsylvania have addressed the issue of stair defects with varying results. For example, in Copelan v. Stanley Co. of America, 17 A.2d 659 (Pa. 1941), the court found that a slightly sloped stair in a theater was not sufficiently defective to impose liability on the theater owner because the stair had been properly constructed and was simply worn from use. Likewise, in Scott v. Farmers & Miners Trust Co., 38 Pa. D. & C. 692 (Pa. Ct. Comm. Pleas 1940), the court concluded that a riser variance of one and one-eighth inches was "such a small variance from uniformity" that it could not amount to negligence on the part of a building owner. However, in Kirschbaum v. WRGSB Assocs., No. 97-5532, 1999 WL 1243846 at *7 (E.D. Pa. Dec. 14, 1999), the court listed in its findings of fact that a riser variation of five-eighths of an inch was a tripping hazard.

Courts in other jurisdictions have also drawn various conclusions, depending on the facts and circumstances of each case. Compare Rollins v. Elks Place Professional Plaza, 505 So. 2d 149, 152 (4th Cir. 1987) (finding liability where more than one-third of steps between fifteenth and ground floors of a public building varied more than three-sixteenth of an inch "the risk of harm created by a defective stairway could be deemed an unreasonable risk") with Chisholm v. Fulton Supply Co., 361 S.E.2d 540, 541 (Ga. Ct. App. 1987) (finding stairs with slight riser variation built before building code required uniformity were not so defective as to impose liability). Inasmuch as the five courts cited immediately above as examples of riser discrepancy cases have rendered decisions of differing conclusions, it seems undeniable to this Court that reasonable minds can – and do – differ on the very subject at hand.

Considering the evidence in a light most favorable to Mr. Mascharka, the determination as to whether the defect in the steps is trivial is a question best suited for a jury. The Apex Report provided by Mr. Mascharka to establish that the stairs were defective states that the variation in the riser height of the stairs exceeded the permitted variation by more than four times – evidence from which a reasonable juror, after assessing the expert's credibility, could conclude that the defect was not trivial. Moreover, there is deposition testimony that at least one of the witnesses to the accident considered that the stairs were not "normal." This evidence suggests that any defect in the stairs might not have been "obviously trivial," and should therefore be placed in the jury's hands for resolution.

CONCLUSION

In summary, after considering the arguments of the parties, the Court concludes that there are material facts which the parties dispute and, considering, as the Court must, the evidence in a light most favorable to Mr. Mascharka, the Defendants' motion for summary judgment will be denied.

An appropriate Order follows.

/S/
Gene E.K. Pratter
United States District Judge

December 23, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM MASCHARKA,	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	
	:	
LEOLA FAMILY RESTAURANT, INC.,	:	
D/B/A LEOLA FAMILY RESTAURANT.	:	
SMUCKER MANAGEMENT CORP.,	:	
GEORGE DESMOND AND	:	
PATRICIA DESMOND, H.W,	:	
	:	
Defendants	:	NO. 03-4051

O R D E R

AND NOW, this 23rd day of December, 2004, upon consideration of the Defendants' Motion for Summary Judgment (Docket Nos. 17, 18, 19), the Plaintiff's response thereto (Docket No. 21) and oral argument on the motion (Docket No. 24), it is hereby ORDERED that the motion is DENIED.

BY THE COURT:

/S/
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE